

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 April 2024

**Public Authority:** British Film Institute  
**Address:** BFI Offices  
21 Stephen Street  
London  
W1T 1LN

#### Decision (including any steps ordered)

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1. The complainant has requested information from the British Film Institute (BFI) about information held on a previous ICO complaint case. The BFI provided information but redacted some of it, citing sections 36 and 40(2) of FOIA. The BFI later withdrew section 36 but maintained its citing of section 40(2) – personal information. The complainant raised doubts that all the non-exempt information they had requested had been provided.
2. The Commissioner's decision is that the BFI cited section 40(2) appropriately and that, on the balance of probability, all the requested information to which the complainant is entitled has been provided.
3. The Commissioner does not require further steps.

#### Request and response

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4. On 29 August 2023 the complainant wrote to the BFI and requested information. The request was in two parts, the second part of the request being for personal data. The first part was a request under the FOIA relating to ICO complaint case [IC-235054-Z1S1](#):

“Please note that this is not a repeat of the above request, it is

about the above request. This is sometimes referred to as a 'meta request'. For more information, please see the ICO's guidance:

<https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/requests-about-previous-information-requests-meta-requests/>

I am especially (therefore not only) interested in obtaining the following:

- A) The date of the qualified person's opinion (QPO)
- B) A copy of the QPO
- C) All the submissions passed to the qualified person for the purpose of determining the opinion, and connected documentation.

Even though Section 36 was not ultimately relied on in the decision notice, a QPO did take place, so please send me the info I request on it, plus all the other material I allude to above."

5. The BFI responded on 26 September 2023 and provided what it described as "all" the information it held in a redacted form. It would appear that the information provided was the same as had been provided for a previous request [IC-235054-Z1S1](#). Parts of the information were withheld under sections 40(2) and 36(2)(b)(ii) of FOIA.
6. On 27 September 2023 the complainant requested an internal review because they did not believe that they had been provided with the QPO and all the requested information.
7. On 25 October 2023 the BFI refused to conduct an internal review as it did not accept that the FOIA applied to the requested information and directed the complainant to the ICO decision referred to in paragraph 5.

## Scope of the case

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8. The complainant contacted the Commissioner on 27 October 2023 to complain about the way their request for information had been handled.
9. The Commissioner wrote to the BFI on 12 February 2024 explaining that the focus of his investigation would be to determine if the BFI had cited sections 36 and 40(2) of FOIA appropriately, if it was continuing to do so.

10. Subsequent correspondence and a Teams meeting on 12 March 2024 with the BFI determined that there had been some misunderstanding over the request. The BFI had apparently assumed that it could respond in the same way as it had for the previous request and that, ultimately, the ICO's determination that the information relating to IC-235054-Z1S1 fell outside the FOIA meant that the same would apply to this request. The Commissioner explained that this request was for information held that had been generated by the previous request. This would encompass the QPO and associated information but excluded the information that had been withheld on the previous request.
11. What emerged from this meeting was that the QPO had not been sought for this request, only for the earlier request. To clarify, this means that a QPO was not sought as to whether the earlier QPO could be released or not. The BFI accepted that this was the case and that section 36 of FOIA could not therefore apply to the request that is the subject of this decision. Another factor that emerged was that the requested information had already been provided on 26 September 2023 and prior to that on IC-23504-Z1S1 as part of that disclosure.
12. It was also agreed during the meeting that the BFI would respond and either provide the information (minus personal data and the withheld information from the previous case) or explain that the complainant had already been given everything it held, with the exception of the ICO side of the correspondence.
13. The BFI sent a further response to the complainant on 23 March 2024 and provided the same file as it had previously given them on IC-235054-Z1S1 (7 August 2023) and on 26 September 2023. The BFI's view is that this file contains the requested information – the QPO and the remainder of the information that fell within scope. However, it asked if the complainant required the correspondence between the ICO and the BFI in the course of investigating that complaint and offered to provide it.
14. On 25 March 2024 the Commissioner wrote to the complainant and outlined his initial view. In a later series of emails the complainant confirmed to the Commissioner that they did not require the ICO/BFI correspondence as it was already in their possession. They also confirmed that they did not expect to receive the information that had been withheld on the earlier case. However, the complainant did not accept that some personal data should have been redacted or that the QPO and submissions to the QP had been provided.
15. The Commissioner explained to the complainant that he can only consider whether the BFI has located all the information falling within scope of the request. He cannot analyse that opinion as an earlier

decision had been made regarding it and that decision stated that the information fell outside of the FOIA. The complainant has said that they are not trying to reopen the previous investigation but queried whether pp 89-93 of the file of information contains the information they requested.

16. The Commissioner considers that the scope of his investigation is to consider whether the redactions the BFI made under section 40(2) to the information requested on 29 August 2023 were appropriate and whether the BFI holds any further information beyond what it has already provided in a redacted form.

## Reasons for decision

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### Section 1 – general right of access to information held by public authorities

17. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

18. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
19. In a series of emails on 25 and 26 March 2024 the complainant disputed whether they had been provided with the QPO. The Commissioner pointed out that these opinions vary – some are provided in a more formal manner whilst others are just emailed acceptance of the submissions/arguments that have been presented to them for agreement. In many cases the QP is already aware of the context and the information that is being requested. The complainant did not accept that a very succinct sentence from the QP was in fact their opinion because it was not presented in the way the complainant expected it to be. The Commissioner explained that he was not intending to consider the correctness or otherwise of the QPO because he was not investigating section 36 as it had been withdrawn. He could only look at

whether the information to which the complainant was entitled had been provided.

20. During his investigation the Commissioner asked the BFI a series of questions designed to elicit what searches had been made and how those searches had been conducted.
21. The BFI contended that it had provided "all of the information that falls within the scope of the request (subject to exemptions)". The BFI stresses that the information had been ruled out-of-scope in an ICO decision "but some was nevertheless provided on a voluntary basis".
22. Key personnel were contacted who "may have held information" and it was "confirmed they held nothing pertinent to the request". The BFI states that "staff were also consulted directly" but it is unclear whether this means the wider staff or not. It did carry out "keyword searches in relation to the request across all BFI network folders" held at the time of the request. Searches had "yielded only the folder from [an] ex-employee, the contents of which the ICO subsequently ruled to be not covered by FOIA". There were "No further emails or documents of any kind...discovered as part of this search". "The search terms were: Creative Industries Independent Standards Authority, Independent Standards Authority, ISA and CISSA. The BFI acknowledges that "CISSA" was the wrong acronym (it should have been "CIISA"). The BFI explains that "documents would have been discovered under the ISA search term so believe this was still a thorough search". It intends to carry out "a further search under CIISA as a matter of urgency and will report if this produces anything which would fall within scope..."
23. Subsequent requests have meant that "other search terms not originally given" were searched for "each time and no further information was yielded". The BFI gave confirmation to the requester concerning why the ex-employee's account was deleted in line with its organisational policies for staff leaving the BFI. All records are retained for up to 30 days after an employee ceases employment. The BFI has searched and been unable to locate any of this documentation "anywhere else within the BFI network". The information is not covered by statutory requirements or statutory retention periods.
24. For completeness, the Commissioner asked that the BFI search again under the correct acronym. The BFI agreed to do so and also searched under another search term that the complainant had requested. On 22 April 2024 the BFI confirmed that these searches did locate further information but none of that information fell within the scope of this request and is therefore not being considered here.

25. The Commissioner is satisfied that, on the balance of probability, there is no further information held by the BFI falling within the scope of this request.

#### **Section 40 – personal information**

26. The Commissioner only intends to consider the personal data identified as falling within the scope of this request. He will not consider the information from the previous case on IC-23504-Z1S1 which the complainant has accepted.
27. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
28. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the D principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
29. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
30. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

#### **Is the information personal data?**

31. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
32. The two main elements of personal data are that the information must relate to a living individual and that the person must be identifiable.
33. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
34. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

35. In the circumstances of this case, the BFI -

“withheld the names of anyone who was not a senior member of staff, unless it was someone with whom the requestor had already corresponded, or members of staff from third party organisations as we did not have their consent to release their personal details”.

The Commissioner notes that email contacts were also redacted in some cases. Clearly the names of individuals identifies them.

36. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

37. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

38. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

39. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

40. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

41. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>1</sup> .

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<sup>1</sup> Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- “In

42. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

43. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

44. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

45. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

### **Is disclosure necessary?**

46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

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determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".



47. The complainant has stated to the Commissioner that they are not interested in seeing the names of junior members of staff. However, the complainant stated that it had "become necessary to understand the way that the request was co-ordinated with other agencies, to see if the was done in a proper manner".
48. As indicated earlier, the Commissioner is solely considering personal data generated by the complaint itself, and has not considered the withheld information from IC-23504-Z1S1. The complainant also did not require correspondence between the ICO and the BFI. That only left any remaining personal information that was created by the BFI in the course of processing the information request that was the subject of IC-23504-Z1S1 about which the Commissioner has made his determination. The complainant has been provided with the names of senior staff at the BFI. The Commissioner is not persuaded that there is a necessity to disclose the names of junior BFI members of staff or external individuals beyond the complainant's desire to see them.
49. As the test of necessity has not been met, the Commissioner does not need to go on to consider the balance between the legitimate interests and the interests or fundamental rights and freedoms of the data subject.
50. As disclosure is not necessary, there is no lawful basis for the disclosure of the requested information. Disclosure would be unlawful and would therefore breach the first DP principle. The Commissioner finds that the BFI was entitled to rely on section 40(2) of FOIA for the information it has withheld.

## **Other matters**

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51. The BFI refused to conduct an internal review regarding this request because it relied on the Commissioner's previous determination that the information fell outside the legislation. Internal reviews are not mandatory but, if a public authority offers them, it should carry them out. In this instance it refused to do so because it had misinterpreted the request.
52. The Commissioner notes that the BFI has several times provided the same file of information to the complainant. Although this seems to have been done in an attempt to provide as much information as possible, it resulted in a lack of signposting to the complainant until very late in the day.

## Right of appeal

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53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**